Supreme Court, U.S.
FILED

96 341 AUG 29 1996

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States
October Term, 1996

Duncan Aircraft Sales of Florida, Inc.,

Petitioner,

vs.

Phillip R. and Edna Cappello,
Individually, and Phillip R. Cappello
as Administrator of the Estate of
Kirk P. Cappello,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

Petition for Writ of Certiorari

Cynthia Hollingsworth*
Martin E. Rose
Kathleen M. Goodman
GARDERE & WYNNE, L.L.P.
3000 Thanksgiving Tower
Dallas, Texas 75201
(214) 999-3000
Attorneys for Petitioner
*Counsel of Record

30pp

QUESTION PRESENTED

Whether the federal aviation regulations which give pilots responsibility for safety of aircraft alleviate any concurrent responsibility of air traffic controllers to assist pilots operating under visual flight rules with terrain avoidance.

RULE 29.1 LIST OF PARTIES

Petitioner Duncan Aircraft Sales of Florida, Inc., has the following parent companies or subsidiaries within the meaning of Supreme Court Rule 29.1:

None.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.1 LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS AND JUDGMENTS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 6

ARGUMENT 9

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Biles v. United States,
848 F.2d 661 (5th Cir. 1988) 14

Cappello v. Duncan Aircraft Sales of Florida, Inc.,
No. 3-92-0214 (M.D. Tenn. Feb. 15, 1994) . . 2

Cappello v. Duncan Aircraft Sales of Florida, Inc.,
79 F.3d 1465 (6th Cir. 1996) 2, 12, 19

Dyer v. United States,
551 F. Supp. 1266 (W.D. Mich. 1982) 15

First of America Bank-Cent. v. United States,
639 F. Supp. 446 (W.D. Mich. 1986) . . . 10, 17

Frutin v. Dryvit Systems, Inc.,
760 F. Supp. 234 (D. Mass. 1991) 17

Furumizo v. United States,
245 F. Supp. 981 (D. Haw. 1965),
aff'd, 381 F.2d 965 (9th Cir. 1967) 16

In re Greenwood Air Crash,
924 F. Supp. 1518 (S.D. Ind. 1995) . 13, 18, 19

Himmler v. United States,
474 F. Supp. 914 (E.D. Pa. 1979) 10, 11, 15, 16

Indian Towing Co. v. United States,
350 U.S. 61 (1955) 11

Kack v. United States, 570 F.2d 754 (8th Cir. 1978) . 14

Martin v. United States,
586 F.2d 1206 (8th Cir. 1978) 16

Mattschei v. United States,
600 F.2d 205 (9th Cir. 1979) 13, 17

Pierce v. United States,
600 F.2d 617 (6th Cir. 1982) 11

Redhead v. United States,
686 F.2d 178 (3d Cir. 1982), *cert.*
denied, 459 U.S. 1203 (1983) 12, 17

Rodriquez v. United States,
823 F.2d 735 (3d Cir. 1987) 15

Rudelson v. United States,
602 F.2d 1326 (9th Cir. 1979) 13, 14

Todd v. United States,
384 F. Supp. 1284 (M.D. Fla. 1975),
aff'd, 553 F.2d 384 (5th Cir. 1977) 14

Schuler v. United States,
868 F.2d 195 (6th Cir. 1989) 15

Thurston v. United States, 888 F.Supp. 1100
(D. Utah 1995) 15

Webb v. United States,
840 F. Supp. 1484 (D. Utah 1994) 18

Statutes and Regulations

28 U.S.C.A. § 1254(1) (West 1993) 2

28 U.S.C.A. § 1332 (West 1993) 2

Federal Aviation Act of 1958, 49 U.S.C.A.
§§ 40101-49104 (West Supp. 1996) 10

49 U.S.C.A. § 40101 (West Supp. 1996) 3, 9, 10

49 U.S.C.A. § 40103 (West Supp. 1996) 3, 11

14 C.F.R. §§ 61.1 - 61.201 (1996) 15

14 C.F.R. §§ 91.1 - 91.193 (1996) 15

14 C.F.R. § 91.3 (1996) 5, 16

14 C.F.R. § 91.103 (1996) 5, 16

Federal Aviation Admin., U.S. Dep't of Transp.,
Order No. 7110.65J,
Air Traffic Control (1995) . . 4, 5, 10, 11, 15, 16

Federal Aviation Admin., U.S. Dep't of Transp.,
Order No. 7110.65G,
Air Traffic Control (1992) 18

Federal Aviation Admin., U.S. Dep't of Transp.,
Order No. 7220.2A
Air Traffic Control 19

Other Authorities

Crew Unsure of Position on Approach to Cali, Aviation Wk. & Space Tech., May 13, 1996 20

Andrew J. Dilk, *Aviation Tort Litigation Against the United States—Judicial Inroads Into the Pilot-In-Command Concept*, 52 J. Air L. & Comm. 797 (1987) 13

Federal Aviation Admin., U.S. Dep't of Transp., Aeronautical Information Manual (1995) . 17, 18

Jim Glab, *The FAA Under Siege*, Frequent Flyer, August 1996 9

Elizabeth Gleick, *Can We Ever Trust the FAA? In the ValuJet Aftermath, it is Under Pressure to Make Safety its First and Only Mission, But it is Understaffed and Underfunded*, Time, July 1, 1996 9

John Hoff, *Legally Speaking: Who's Responsible*, IFR Magazine, June 1996 12

House Bill Would Make Safety FAA's Top Job, Air Safety Wk., July 22, 1996 9

Industry Moving to Defeat CFIT Accidents, Air Safety Wk., April 29, 1996 20

Edward H. Phillips, *Multiple Errors Linked to Brown Crash*, Aviation Wk. & Space Tech., June 17, 1996 20

Statement of David Hinson on the Nation's Air Traffic Control System, U.S. Dept. of Trans. News Release, October 17, 1995 11

Christina Del Valle and Douglas Harbrecht, *Wanted: A New Flight Plan for the FAA,* Bus. Wk., July 1, 1996 9

No. _____

In the
Supreme Court of the United States
October Term, 1996

Duncan Aircraft Sales of Florida, Inc.,

Petitioner,

vs.

Phillip R. and Edna Cappello,
Individually, and Phillip R. Cappello
as Administrator of the Estate of
Kirk P. Cappello,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

TO THE UNITED STATES SUPREME COURT:

Duncan Aircraft Sales of Florida, Inc., asks this court to issue a writ of certiorari to review the judgment rendered March 27, 1996, by the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND JUDGMENTS BELOW

Petitioner has reproduced in a separate appendix the opinions and judgments which the courts below have issued. The opinions and judgments are as follows:

Cappello v. Duncan Aircraft Sales of Florida, Inc., 79 F.3d 1465 (6th Cir. 1996) (opinion on appeal from district court).

Cappello v. Duncan Aircraft Sales of Florida, Inc., No. 3-92-0214 (M.D. Tenn. Feb. 15, 1994) (district court judgment).

JURISDICTION

Respondents Phillip and Edna Cappello filed this case against Duncan Aircraft Sales of Florida, Inc., in a Tennessee state court, alleging claims for negligence under state law. Duncan Aircraft removed the case to a United States district court, and that court's jurisdiction was based on diversity of citizenship, pursuant to 28 U.S.C.A. § 1332 (West 1993).

The court of appeals issued its opinion and judgment on March 27, 1996. On June 3, 1996, that court denied the petition for rehearing which Duncan Aircraft filed. This Court's jurisdiction to review the court of appeals' judgment arises from 28 U.S.C.A. § 1254(1) (West 1993).

STATUTES & REGULATIONS INVOLVED

49 U.S.C.A. § 40101 (d) (West Supp. 1996):

Safety considerations in public interest.—In carrying out subpart III of this part and those provisions of subpart IV applicable in carrying out subpart III, the Administrator shall consider the following matters, among others, as being in the public interest:

> (1) regulating air commerce in a way that best promotes its development and safety and fulfills national defense requirements.
>
> . . .
>
> (3) controlling the use of the navigable airspace and regulating civil and military operations in that airspace in the interest of the safety and efficiency of both of those operations.

49 U.S.C.A. § 40103 (b) (West Supp. 1996):

> Use of airspace.—
>
> (1) The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest.
>
> (2) The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for —

(A) navigating, protecting, and identifying aircraft;

(B) protecting individuals and property on the ground;

(C) using the navigable airspace efficiently; and

(D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

Federal Aviation Admin., U.S. Dep't of Transp., Order No. 7110.65J, Air Traffic Control § 2-1-2 (1995):

a. Give first priority to separating aircraft and issuing safety alerts as required in this order. Good judgment shall be used in prioritizing all other provisions of this order based on the requirements of the situation at hand.

. . .

Note. — Because there are many variables involved, it is virtually impossible to develop a standard list of duty priorities that would apply uniformly to every conceivable situation. Each set of circumstances must be evaluated on its own merit, and when more than one action is required, the controller shall exercise his best judgment based on the facts and circumstances known to him. That action which is most critical from a safety standpoint is performed first.

Federal Aviation Admin., U.S. Dep't of Transp., Order No. 7110.65J, Air Traffic Control § 2-1-6 (1995):

Issue a safety alert to an aircraft if you are aware the aircraft is in a position/altitude which, in your judgment, places it in unsafe proximity to terrain, obstructions, or other aircraft. Once the pilot informs you action is being taken to resolve the situation, you may discontinue the issuance of further alerts. Do not assume that because someone else has responsibility for the aircraft that the unsafe situation has been observed and the safety alert issued; inform the appropriate controller.

Note 1 — The issuance of a safety alert is a first priority (see paragraph 2-1-2) once the controller observes and recognizes a situation of unsafe aircraft proximity to terrain, obstacles, or other aircraft. Conditions, such as workload, traffic volume, the quality/limitations of the radar system, and the available lead time to react are factors in determining whether it is reasonable for the controller to observe and recognize such situations. While a controller cannot see immediately the development of every situation where a safety alert must be issued, the controller must remain vigilant for such situations and issue a safety alert when the situation is recognized.

14 C.F.R. § 91.3(a) (1996): The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.

14 C.F.R. § 91.103 (1996): Preflight action. Each pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight.

STATEMENT OF THE CASE[1]

On March 16, 1991, at approximately 1:42 in the morning, a private jet carrying country singer Reba McEntire's tour band crashed into a mountain near San Diego shortly after take-off. All nine people on board the jet were killed, including band leader Kirk Cappello.

Petitioner Duncan Aircraft Sales of Florida, Inc. had provided the jet and the pilot, Donald Holmes. Earlier that evening, Holmes had filed a flight plan indicating that he intended to fly the aircraft under instrument flight rules ("IFR") to Ft. Wayne, Indiana. However, the band was not ready to leave until well after 1:00 in the morning, and by that time Holmes could not obtain an IFR clearance from the airport's control tower because it was closed. Holmes thus decided to take off under visual flight rules ("VFR") and, once in the air, to obtain his IFR clearance from the air traffic controller in San Diego.

Immediately following take-off, Holmes contacted air traffic controller Jim Hughes, the only controller on duty at that time of night, and asked for his IFR clearance. Unknown to Holmes, the Federal Aviation Administration's ("FAA") computer system had cancelled his flight plan pursuant to local FAA procedures. However, all of the information on Holmes' flight plan was available on a strip in front of controller Hughes (III Tr. 693-94). Despite knowing that the aircraft was already airborne, Hughes

---

[1] Except where record references show otherwise, these facts are drawn from the court of appeals' opinion. However, Duncan Aircraft does not agree with, and the record does not support, all facts as stated in that opinion.

refused to issue an immediate IFR clearance to Holmes, choosing instead to first reenter the flight plan into the computer. This data entry procedure required Hughes to turn around and face the computer console, and so while he was performing this minor administrative task he had his back to the radar screen.

At 1:42:16 a.m. Hughes interrupted his typing to radio Holmes, give him his aircraft's identification code—known as a "beacon code" or "squawk"—and instruct him to confirm his position by pushing his transponder's "ident" button. Holmes responded at 1:42:19, informing controller Hughes that he was dialing the squawk into the transponder on the aircraft.

Although Hughes saw the aircraft on the radar screen when Holmes contacted him immediately after take-off (III Tr. 714), Hughes did not check the screen to verify the aircraft's position, direction and altitude after issuing the transponder code. Instead, Hughes returned to the computer and continued retyping the flight plan. Thus, when Holmes' aircraft crashed into Otay Mountain, Hughes still had his back turned on the radar screen.

Missouri residents Phillip and Edna Cappello filed a wrongful death action in a Tennessee state court. The three defendants, residents of Texas, Pennsylvania, and Georgia, removed the case to the federal district court. The Cappellos then added Florida resident Duncan Aircraft as a defendant and dismissed the original defendants.

The parties tried the case to a jury, which was asked to apportion liability among Duncan Aircraft, Hughes, and an FAA flight service specialist named Kessock. The jury found that all three were negligent, that their negligence

proximately caused the crash, and that responsibility should be apportioned 45 percent to Duncan Aircraft, 27.5 percent to Hughes, and 27.5 percent to Kessock. The jury awarded compensatory damages in the sum of $732,829, and the district court rendered judgment on the verdict. The Cappellos appealed.

The court of appeals reversed the judgment. It ruled that the district court had erred in asking the jury to apportion responsibility to FAA employees Hughes and Kessock. The court said that apportionment of responsibility to Hughes was error because a pilot flying under visual flight rules is not under the direction or control of air traffic controllers and thus has "sole responsibility to maintain eye contact with the ground and to avoid obstructions."

The court acknowledged that if Hughes had not turned around to retype the flight plan he would have had time to notice that the aircraft was flying toward mountains at an unsafe altitude. Indeed, from just after take-off until the moment of impact, the aircraft was within Hughes' traffic control sector and was clearly visible on his radar screen. Nevertheless, the court decided that under FAA regulations Hughes' administrative duty to retype Holmes' flight plan outweighed any duties that FAA regulations might otherwise impose on Hughes to watch his radar screen or provide the IFR clearance that Holmes had requested.

Thus, the court of appeals concluded that "[t]he legal fault here is solely the defendant's, under the doctrine of respondeat superior." The court set aside the jury's findings as to the responsibility of FAA employees Hughes and Kessock, set aside the damages award based on a challenge to the expert damages testimony that Duncan Aircraft had offered, and remanded the case for a trial on damages only.

ARGUMENT

Congress has charged the Federal Aviation Administration with promotion of aviation and aviation safety. 49 U.S.C.A. § 40101 (West Supp. 1996). Despite this dual mandate, the agency's "mission is really safety." *House Bill Would Make Safety FAA's Top Job*, Air Safety Wk., July 22, 1996 (quoting Senate Commerce Committee aid). Recent public investigations of aviation accidents, however, have revealed that the FAA has failed to put "safety first." *E.g.*, Christina Del Valle and Douglas Harbrecht, *Wanted: A New Flight Plan for the FAA,* Bus. Wk., July 1, 1996, at 39 (noting the FAA's rejection of numerous safety proposals because "the changes would be too costly for airlines and aircraft manufacturers"); Elizabeth Gleick, *Can We Ever Trust the FAA? In the ValuJet Aftermath, it is Under Pressure to Make Safety its First and Only Mission, But it is Understaffed and Underfunded,* Time, July 1, 1996, at 48 ("FAA has not always moved as decisively as it might on safety matters"); Jim Glab, *The FAA Under Siege,* Frequent Flyer, August 1996, at 37 (discussing FAA's "failure to give safety regulations priority").

In this particular case, the court decided that an air traffic controller could perform a low priority administrative task rather than assume control of an aircraft and ensure its safety, despite the pilot's request for immediate clearance and despite the controller's ready access to information of imminent danger. The court decided that if FAA regulations have imposed "primary responsibility" on VFR pilots to avoid terrain and obstacles, air traffic controllers do not have any concurrent duty to assist such pilots in terrain avoidance.

If a "safety first" policy best implements Congress's intent with regard to the FAA's regulation of aviation in this country, the Sixth Circuit's decision goes the wrong way and sends the opposite message. To the extent the Sixth Circuit's decision has placed FAA air traffic controllers beyond any responsibility for accidents by VFR pilots flying within their sector, the court has struck down a significant incentive for air safety—namely, legal liability.

The court of appeals' conclusion contradicts not only the policy concerns underlying Congressional regulation but also the regulations themselves, as expressed in the federal aviation regulations and the Air Traffic Control Manual. These publications contain the FAA rules, regulations, and procedures applicable to FAA air traffic controllers, and they uniformly insist that air traffic controllers put safety concerns first, even with regard to VFR flights. Thus, the court of appeals' decision contradicts the entire spectrum of legislation and administrative regulation of air traffic. In short, the decision promotes bad policy and is simply wrong.

A. The court's decision contradicts Congressional policy under the Federal Aviation Act of 1958.

The responsibilities of FAA air traffic controllers are governed by the Federal Aviation Act of 1958, 49 U.S.C.A. §§ 40101-49104 (West Supp. 1996); regulations the FAA has promulgated pursuant to the Act (title 14 of the Code of Federal Regulations); and the FAA's Air Traffic Control manual (Federal Aviation Admin., U.S. Dep't of Transp., Order No. 7110.65J, Air Traffic Control (1995) [hereinafter "Air Traffic Control Manual"]). *First of America Bank-Cent. v. United States,* 639 F. Supp. 446, 455 (W.D. Mich 1986); *Himmler v. United States,* 474 F. Supp. 914, 929 (E.D. Pa. 1979).

By means of the Federal Aviation Act, Congress has directed the FAA to develop the navigable airspace and "assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace." 49 U.S.C.A. § 40103(b) (West Supp. 1996). The FAA thus has a duty to prescribe regulations for "navigating, protecting and identifying aircraft." *Id.* § 40103(b)(2)(A). Accordingly, the FAA has promulgated a system of air traffic control that encompasses nearly all of the airspace in the United States.

Air traffic controllers comprise an essential link in the chain of responsibility for air safety. Air traffic control operates twenty-four hours a day, 365 days per year, handling two aircraft per second and moving 1.5 million people per day to their destinations. *Statement of David Hinson on the Nation's Air Traffic Control System,* U.S. Dept. of Transp. News Release, Oct. 17, 1995, 1995 WL 614511. It is virtually impossible to fly an aircraft within the United States without coming into contact with the FAA's air traffic control system. Having undertaken to promote safe air travel, the government owes the pilots and passengers who rely on it a duty to perform its obligations with due care. *See Indian Towing Co. v. United States,* 350 U.S. 61, 64-65 (1955); *Pierce v. United States,* 600 F.2d 617, 621 (6th Cir. 1982).

As is illustrated by this case, in an air traffic control room it is always possible that a tragic accident may occur "in a matter of seconds if controllers who assume a high responsibility relax from constantly overseeing an aircraft to promote safety of flight." *Himmler,* 474 F. Supp. at 928. Accordingly, air traffic controllers must "give first priority to separating aircraft and issuing safety alerts." Air Traffic Control Manual § 2-1-2. In this case, if controller Hughes

had given safety concerns first priority, the aircraft would have passed thousands of feet above Otay mountain and nine fatalities would have been averted.

Nevertheless, the court held that Hughes was not negligent when he turned his back on his radar screen in order to complete a minor administrative task. In essence, the court said that controllers may, without fear of repercussion, disregard the safety of VFR aircraft in their sector; until Air Traffic Control provides an IFR clearance, the pilot alone must bear the burden of ensuring the safety of his or her passengers. This, apparently, is how the general public views the court's decision. *See* John Scott Hoff, *Legally Speaking: Who's Responsible,* IFR Magazine, June 1996, at 21 (reviewing the *Cappello* decision and noting that the Sixth Circuit put "full and total responsibility on the shoulders of the pilot").

The judiciary should not be so quick to relieve air traffic controllers of their safety responsibilities. On the contrary, the safety of air travelers demands that controllers be held to a high standard of care. *Redhead v. United States,* 686 F.2d 178, 189 (3d Cir. 1982) (Becker, J. dissenting), *cert. denied*, 459 U.S. 1203 (1983). Rather than insisting that the FAA maintain this standard of care, the court below has condoned FAA decisions to put safety second, not first.

B. The case involves a question of law which is unsettled and requires resolution by this Court.

The various decisions among the circuits on the issues in this case cannot be construed as articulating a coherent rule of law. Courts generally agree that the duties of air traffic controllers are delineated by federal law. They have not been able to agree, however, as to exactly how the obli-

gations of air traffic controllers relate to the duties of the pilot-in-command, particularly when the pilot is operating under visual flight rules. *See* Andrew J. Dilk, *Aviation Tort Litigation Against the United States—Judicial Inroads Into the Pilot-In-Command Concept*, 52 J. Air. L. & Comm. 797, 805 (1987).

The decisions among the circuits essentially reveal two conflicting philosophies. The first holds that air traffic controllers and pilots have concurrent obligations to prevent harm, whether the aircraft is operating under VFR or IFR conditions. Under this majority view the pilot and controller have concurrent, overlapping responsibility to exercise due care to avoid accidents. *See In re Greenwood Air Crash,* 924 F. Supp. 1518, 1538 (S.D. Ind. 1995) (citing *Mattschei v. United States*, 600 F.2d 205, 208 (9th Cir. 1979)).

In *Greenwood,* the pilot filed an IFR flight plan and then departed VFR to pick up his IFR clearance enroute, just as pilot Holmes did in this case. 924 F. Supp. at 1526. After the plane appeared on FAA radar, it collided with a another aircraft which was also operating VFR. The court held that because the air traffic controller could see both aircraft on his radar scope, he had a duty to direct his attention to the scope and issue a warning to prevent the collision. The court noted that if the controller had scanned his radar scope at the time of the pilot's initial radio contact, he would have had ample time to observe the situation and issue a warning. The controller's "inattention to his radar scope" and his "failure to become aware of the unsafe proximity of the aircraft" were negligent. *Id.* at 1533-34.

Similarly, the Ninth Circuit has recognized that an air traffic controller has a duty to monitor the position of VFR aircraft and warn of impending danger. *Rudelson v. United*

States, 602 F.2d 1326, 1328 (9th Cir. 1979) (holding that air traffic controller was negligent for failure to monitor and warn VFR pilots of impending midair collision). The court acknowledged that pilots and controllers share a duty of care for the safety of the occupants of aircraft. *Id.* at 1329.

These cases involved collisions with other aircraft rather than with terrain, but they stand for the same general proposition: that pilots' duty to be cognizant of danger does not eliminate controllers' responsibility to watch for and warn of that danger. Furthermore, many courts have also recognized the concurrent duties of air traffic controllers and pilots in situations involving controlled flight into terrain. *See, e.g., Biles v. United States*, 848 F.2d 661, 663 (5th Cir. 1988) (holding that controller was not liable for impact with terrain, but acknowledging that "the controller must assist even careless pilots who, based on the facts known to the controller, have placed themselves in a dangerous position"); *Todd v. United States*, 384 F. Supp. 1284, 1292 (M.D. Fla. 1975) (holding that although the presence of the terrain and the danger it presented should have been equally obvious to the pilot, "Air Traffic Control nevertheless had a duty to warn" the pilot of the presence of a mountain), *aff'd*, 553 F.2d 384 (5th Cir. 1977).

In contrast, the minority position holds that the VFR pilot's primary duty to ensure the safety of the aircraft absolves air traffic controllers of any responsibility for the well-being of the passengers. Courts that adhere to this view hold that controllers have no duty to warn pilots of dangers of which the pilot should be aware. *See, e.g., Kack v. United States*, 570 F.2d 754, 756 (8th Cir. 1978) (holding controller was not liable for crash caused by wake turbulence because the pilot was primarily responsible for the safe operation of the aircraft when VFR, regardless of the traffic clearance);

Schuler v. United States, 868 F.2d 195, 197 (6th Cir. 1989) (holding controller was not negligent for failing to keep the pilot, who was operating with one engine, informed of status of the runway because in VFR conditions the primary responsibility for safe operation of the aircraft remains with the pilot); *Thurston v. United States,* 888 F. Supp. 1100, 1110 (D. Utah 1995) (holding controllers were not negligent in assisting VFR pilot who crashed into mountainous terrain because controllers had no duty to warn pilot of a condition of which the pilot should already have been aware).

These cases reveal that a fundamental confusion exists regarding the relationship between the duties of pilots and the duties of controllers regarding flight safety. In the interest of safety, this Court should clarify the responsibilities of air traffic controllers to air travellers.

C. The court of appeals' decision in this case is wrong.

The court below erred in holding that controller Hughes was not negligent. The court's holding was apparently based on the fundamental misconception that Holmes' duties as a pilot operating under visual flight rules absolved Hughes from any responsibility to Kirk Cappello and the other passengers aboard the aircraft.

The duties of both pilots and air traffic controllers are imposed by federal law. *Rodriquez v. United States,* 823 F.2d 735, 739 (3d Cir. 1987). The duties of controllers are set forth in the FAA's Air Traffic Control Manual. *Dyer v. United States,* 551 F. Supp. 1266, 1275 (W.D. Mich. 1982). The duties of pilots are delineated in the federal aviation regulations. 14 C.F.R. §§ 61.1-.201, 91.1-.193 (1996). These regulations have the force and effect of law. *Himmler,* 474 F. Supp. at 931.

Through the Air Traffic Control Manual, federal law commands that controllers put safety concerns above all other priorities. The manual requires controllers to issue a safety alert to any aircraft if they are aware that the aircraft is within unsafe proximity to the terrain, obstructions or other aircraft, and to remain vigilant for such situations. Air Traffic Control Manual § 2-1-6 & n.1. Controllers must give "first priority to separating aircraft and issuing safety alerts." *Id.* § 2-1-2. The manual instructs that controllers are not to "assume that because someone else has responsibility for the aircraft that the unsafe situation has been observed and the safety alert issued." *Id.* § 2-1-6.

Moreover, several courts have recognized that the operating manuals set the minimum standard for controller responsibilities. *E.g. Martin v. United States,* 586 F.2d 1206, 1210 (8th Cir. 1978); *Himmler v. United States,* 474 F. Supp. 914, 931 (E.D. Pa. 1979); *Furumizo v. United States,* 245 F. Supp. 981 (D. Haw. 1965), *aff'd,* 381 F.2d 965 (9th Cir. 1967). These courts have held that controllers also have a duty, apparently arising under federal common law, to exercise their best judgment in trying to help pilots avoid danger when it is, or should be, obviously imminent. *Himmler,* 474 F. Supp. at 931.

Federal law imposes similar duties on pilots. The federal aviation regulations give the pilot-in-command direct responsibility for, and final authority as to, the operation of the aircraft. 14 C.F.R. § 91.3. Prior to departure, pilots are required to become familiar with all available information concerning a flight. 14 C.F.R. § 91.103. In addition, the Aeronautical Information Manual, which the FAA designed to provide pilots with basic flight information and air traffic control procedures, states that pilots have responsibility to watch out for and avoid obstacles when flying in visual

conditions. Federal Aviation Admin., U.S. Dep't of Transp. Aeronautical Information Manual § 5-5-8(a) (1995).[2]

The Sixth Circuit erroneously viewed as mutually exclusive the federal regulations that govern the responsibilities of pilots and the regulations that govern the duties of air traffic controllers. The regulations that give VFR pilots responsibility for terrain and collision avoidance do not eliminate the controller's responsibility to issue safety alerts. The pilot's primary responsibility for collision avoidance is not equivalent to "sole responsibility," as the court of appeals held in this case. Rather, federal aviation regulations require that pilots and controllers each assume *concurrent* responsibility. *Mattschei v. United States,* 600 F.2d 205, 208 (9th Cir. 1979). Once the pilot contacts the controller by radio, the controller has a responsibility to monitor the position of the aircraft and warn of impending danger. *Frutin v. Dryvit Systems, Inc.*, 760 F. Supp. 234, 236 (D. Mass. 1991). The controller may not shirk his or her responsibility by sitting back and relying on the pilot's adherence to the regulations. *Redhead,* 686 F.2d at 186 (Becker, J., dissenting). As the Aeronautical Information Manual explains:

---

[2] The Aeronautical Information Manual was formerly called the "Airman's Information Manual." Unlike the federal regulations, this manual does not have the force and effect of law. Rather, it is only evidence of the standard of care for pilots and controllers. *First of America Bank-Cent. v. United States,* 639 F. Supp. 446, 453 (W.D. Mich. 1986).

> The responsibilities of the pilot and controller intentionally overlap in many areas providing a degree of redundancy. Should one or the other fail in any manner, this overlapping responsibility is expected to compensate, in many cases, for failures that may affect safety.

Aeronautical Information Manual § 5-5-1(e) (1995). Thus, a pilot's negligence does not relieve the air traffic controller of his responsibility. *E.g., Webb v. United States,* 840 F. Supp. 1484, 1511 (D. Utah 1994). Because either or both the air traffic controller's and pilot's negligence may be the proximate cause of an accident, a trier of fact should be allowed to apportion fault if state law otherwise allows. The court of appeals, however, has concluded that, in effect, when a pilot is negligent an air traffic controller cannot be negligent as a matter of law.

Contrary to the lower court's view, whether an aircraft is operating under visual flight rules or instrument flight rules, and whether the pilot is exercising due care or is negligent, federal law requires the controller to remain vigilant for danger and issue all warnings that a reasonable controller would issue under the same circumstances. *See Greenwood,* 724 F. Supp. at 1539. The factors relevant to the determination of what a reasonable controller would do are included in the Air Traffic Control Manual. The factors include: higher priority duties of the controller, radar limitations, traffic volume, frequency congestion, and controller workload. *Id.* (citing Air Traffic Control Manual, FAA Order 7110.65G, ¶¶ 2-6, 2-21 (1992)).

In this case, controller Hughes had no excuse for not monitoring the aircraft and issuing an alert. Hughes did not

have any higher priority duty to attend to during the moments just prior to the fatal accident. This was not a case in which the controller was struggling to manage numerous aircraft; Holmes' airplane was the only aircraft within Hughes' sector at the time of the accident. Hughes' first priority was to ensure the safety of the aircraft's passengers by watching for possibly dangerous situations and issuing any warning that the situationrequired. Instead, he turned his back to the radar screen for at least two minutes in order to perform a secondary task solely for his own convenience.[3] It would have taken Hughes only a moment to ascertain that the plane was in danger and issue warnings that could have prevented the accident. Hughes' "failure to see and realize what was visible and discernable, followed by the failure to give immediate warnings, constitute negligence." *Id.* at 1539.

---

[3] The court below erroneously relied on FAA Order 7220.2A § 30-78, which describes the order in which an air traffic controller should proceed when processing "airfiles." *See Cappello,* 79 F.3d at 1473 n.12. Normally, a pilot files his IFR flight plan with a Flight Service Station prior to departure. The pilot then receives his clearance either prior to departure or, as in this case, after departure. An "airfile" occurs when an VFR pilot files an IFR flight plan while in flight, rather than before departure. In such a case, the pilot gives the air traffic controller information for his IFR flight plan after the aircraft is already airborne. The controller must, of course, record this new information prior to issuing the clearance. In this case controller Hughes was not dealing with an airfiled flight plan. There is no dispute that Holmes had filed the flight plan before take-off, and Hughes had the flight plan information on a strip right in front of him.

The court of appeals, however, reasoned that since Hughes was not looking at the radar screen, he had no duty to issue an alert. The court's reasoning misses the point: if Hughes had been fulfilling his priority duty, he would have issued the clearance immediately and the aircraft would never have been in danger — or at the very least Hughes would have been looking at his radar screen and would have seen the potential danger to the aircraft.

The court would apparently modify the Air Traffic Control Manual to read "if you happen to glance at your radar screen, you should issue a safety alert." This is analogous to telling a lifeguard that because he is busy writing down the names of the children in the swimming pool, he does not have to watch those children swim. In the Sixth Circuit, a lifeguard who was completing this administrative task would be absolved from liability for a child's drowning if, under the circumstances, he failed to see the child heading toward deep water.

The dangers giving rise to this case are not unique. Incidents involving "controlled flight into terrain" have become a serious, yet avoidable, problem. *See, e.g., Crew Unsure of Position on Approach to Cali*, Aviation Week & Space Technology, May 13, 1996, at 52; Edward Phillips, *Multiple Errors Linked to Brown Crash*, Aviation Wk & Space Tech., June 17, 1996, at 71. Controlled flight into terrain has been the primary cause of aviation accidents in the last ten years, accounting for 971 fatalities between 1991 and 1995. *See Industry Moving to Defeat CFIT Accidents,* Air Safety Wk., April 29, 1996, at 1. Competent air traffic control radar service is one factor that can help reduce these accidents. *See id.* at 3. In order to fulfill this obligation, however, the FAA must maintain a commitment to put safety first. The judiciary must insist that it does.

CONCLUSION

For these reasons, this Court should grant this petition for writ of certiorari.

Respectfully submitted,

Cynthia Hollingsworth*
Martin E. Rose
Kathleen M. Goodman

GARDERE & WYNNE
3000 Thanksgiving Tower
Dallas, Texas 75201
(214) 999-3000

Attorneys for Petitioner
*Counsel of Record